Filed 11/16/10 Smith v. Consolidated Medical Staff of Valley General Hospital CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRENTON R. SMITH et al.,

Plaintiffs and Respondents,

v.

CONSOLIDATED MEDICAL STAFF OF CENTRAL VALLEY GENERAL HOSPITAL, HANFORD COMMUNITY MEDICAL CENTER and SELMA COMMUNITY HOSPITAL et al.,

Defendants and Appellants.

F057212

(Super. Ct. No. 08C0069)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

van Hall Law Offices, Suzanne F. van Hall; DiCaro, Coppo & Popcke and Carlo Coppo for Defendants and Appellants.

Andrews & Hensleigh, Barbara Hensleigh and John Aumer for Plaintiffs and Respondents.

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The defendants in this case are challenging the trial court's denial of their special motions to strike pursuant to California's anti-SLAPP statute.[1] We will affirm the order denying the anti-SLAPP motions.

BACKGROUND

The defendants appealing this matter are (1) the Consolidated Medical Staff of Central Valley General Hospital, Selma Community Hospital and Hanford Community Medical Center (CMStaff) and (2) Nicolas E. Reiber, M.D., the chief of the consolidated staff.

The plaintiffs are Brenton R. Smith, M.D., and two of his corporations (collectively, Smith).

This appeal arises from the same lawsuit filed in Kings Superior Court that produced the appeal in *Smith v. Adventist Health System/West* (Nov. 16, 2010, F057211) __ Cal.App.4th __ (*Smith I*).[2] The two appeals concern anti-SLAPP motions by different defendants challenging Smith's first amended complaint. All of the anti-SLAPP motions were denied by the trial court in February 2009.

Because the motions all sought to strike the same pleading and were denied in the same order, the parties in this case have joined in the briefing filed in *Smith I*, *supra*, __ Cal.App.4th __. We will adopt the same approach and will incorporate by reference the facts and discussion from our opinion in *Smith I* into this opinion. As a result, the matters set forth herein are relevant only to this appeal.

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[1]Code of Civil Procedure section 425.16. The acronym "SLAPP" stands for strategic lawsuit against public participation.

[2]In an order filed April 23, 2009, this court directed the coordination of case Nos. F057211 and F057212 so that they would be considered at the same time by the same panel.

DISCUSSION

I. CMStaff's Motion

CMStaff's appellate briefing only raises issues that were raised in *Smith I, supra*, __ Cal.App.4th __. The issues joined in by CMStaff are rejected for the same reasons that they were rejected in *Smith I*. Therefore, we need not discuss CMStaff's anti-SLAPP any further in this opinion.

II. Reiber's Issues on Appeal

Reiber's appellate briefing discusses certain issues as they relate specifically to him. For instance, Reiber contends (1) the acts that allegedly harmed Smith were not taken by him and (2) any alleged wrongs by him were protected by three distinct qualified privileges set forth in the Civil Code. Both of these issues, we note, address step two of the required anti-SLAPP analysis. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [second step concerns whether plaintiff has demonstrated a probability of prevailing on the claim].) We have determined in *Smith I, supra*, _ Cal.App.4th __ that the defendants' anti-SLAPP motions failed at the first step of the analysis. That determination applies here with equal force. Nonetheless, because Reiber may seek to argue his points before the trial court in connection with some other motion, we will address those questions Reiber raises as an alternate basis for our decision to uphold the trial court's denial of his anti-SLAPP motion.

III. Allegations of Reiber's Wrongful Conduct

Reiber's opening brief asserts that he "is not alleged to have committed any act of which Smith complains." We disagree with Reiber's reading of the first amended complaint.

As background, paragraph 9 of the first amended complaint alleged that Reiber was (1) the chief of the CMStaff and chair of the medical executive committee, (2) primarily dependent upon the hospitals of Adventist Health System/West for his income, and (3) tasked with ensuring that the medical executive committee follows the CMStaff

bylaws (Bylaws). The allegations that defendants wrongfully rejected Smith's reapplication for privileges were set forth in paragraph 16 of the first amended complaint as follows:

> "DEFENDANTS, and each of them, claim they are not required to *accept or consider* SMITH's reapplication for privileges. DEFENDANTS' reasons have nothing to do with any patient care concerns or conduct relating to SMITH during the past year. The action of DEFENDANTS, and each of them, violates California law and is inconsistent with the Medical Staff Bylaws."

These allegations are not ambiguous—the reference to defendants, and each of them, clearly includes Reiber. Reiber's interpretation of the phrase "DEFENDANTS, and each of them" in the first amended complaint to exclude himself is plainly wrong. Thus, Smith has alleged that Reiber violated California law and the Bylaws by being among those persons who would not accept or consider Smith's reapplication.

The evidence supporting Smith's allegations regarding Reiber's involvement in the decision to reject his reapplication includes the December 4, 2007, letter from Reiber to Smith that stated, among other things:

> "The Medical Executive Committee of the [CMStaff] considered your application for membership on the [CMStaff] at its meeting on Tuesday, December 4, 2007. Your application cannot be accepted since you have not yet satisfied the waiting period which applies in the case of an adverse appointment decision. We informed you last year that you were not eligible to apply for reinstatement because you had failed to satisfy the waiting period. Please see the letter dated February 21, 2007."

In summary, both the pleading and the evidence in the record are sufficient to demonstrate that Reiber was personally involved in the act of which Smith complains—the decision to reject Smith's reapplication based on the 36-month ineligibility period contained in the Bylaws.[3]

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[3]The parties' briefing and our opinion in *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729 referred to the 36-month period as a waiting period. Because section 4.5-10 of the Bylaws uses the phrase "shall not be eligible" and does not use the term "waiting," this opinion will refer to the 36-month period as an ineligibility period.

Also, Reiber's arguments regarding the conspiracy allegations and that Smith needed to present evidence that Reiber agreed to participate in a conspiracy are equally ill founded.

Under California law, civil conspiracy is a legal doctrine not an independent tort. The significance of the legal doctrine is that each member of the conspiracy may be held directly responsible as a joint tortfeasor even though they did not actually commit the tort themselves. (*Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1141.) Here, the December 4, 2007, letter from Reiber to Smith is evidence that Reiber actually participated in the allegedly wrongful act that damaged Smith. Thus, the civil conspiracy theory is not essential to holding Reiber liable because Smith has alleged that Reiber directly participated in the alleged civil wrong.

IV. Qualified Privilege in Civil Code Section 43.7

A. Contentions of the Parties

Reiber contends that all of the causes of action against him are barred by the immunity provided by subdivision (b) of Civil Code section 43.7.

Smith contends that Reiber's conduct is not protected by the privilege in subdivision (b) of Civil Code section 43.7 because the refusal to accept his reapplication was not peer review activity. We have already determined in *Smith I, supra*, __ Cal.App.4th __ that this assertion is correct—the refusal to accept Smith's reapplication was not peer review activity and, therefore, we conclude it is not protected by section 43.7, subdivision (b). In addition, Smith contends that he presented evidence of Reiber's malice. We agree.

B. Statutory Language

Civil Code section 43.7, subdivision (b) provides that

> "[t]here shall be no monetary liability on the part of, and no cause of action for damages shall arise against, … any member of any peer review committee whose purpose is to review the quality of medical … services rendered by physicians and surgeons, … for any act or proceeding

> undertaken or performed in reviewing the quality of medical … services rendered by physicians and surgeons … if the … committee[] or board member acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he, she, or it acts, and acts in reasonable belief that the action taken by him, her, or it is warranted by the facts known to him, her, or it after the reasonable effort to obtain facts."

In *Moore v. Conliffe* (1994) 7 Cal.4th 634, the California Supreme Court described this statute as providing a qualified immunity for members of medical peer review committees. (*Id*. at p. 652.) The conditions that must be met by a committee or board member seeking protections under the privilege are clearly established by the statutory references to "without malice," "reasonable effort" and "reasonable belief."

C. Reasonableness of Reiber's Interpretation of the Bylaws

The parties dispute both the meaning and application of the sentence in section 4.5-10 of the Bylaws that provides: "An applicant who has received a *final adverse decision* regarding appointment shall not be eligible to reapply to the medical staff for a period of 36 months." (Italics added.)

One of the questions regarding the interpretation of this provision concerns the meaning of the term "final adverse decision." This question was addressed in *Smith v. Adventist Health System/West, supra*, 182 Cal.App.4th at pages 754 through 756, and this court rejected defendants' view that it meant a final *judicial* decision adverse to the applicant. Our analysis of the meaning of the term "final adverse decision" began with the issue whether the term was ambiguous—that is, reasonably susceptible to more than one interpretation. (*Id*. at pp. 754-755.) We did not answer that question:

> "In this case, we will assume for purposes of argument that the term 'final adverse decision' as used in section 4.5-10 of the Bylaws is reasonably susceptible to two interpretations. First, as urged by Adventist Health, it could mean that a decision does not become 'final' until the doctor has exhausted all administrative and judicial mandamus remedies. Second, as argued by Smith, it could mean the final decision of the governing boards." (*Smith v. Adventist Health System/West, supra*, 182 Cal.App.4th at p. 755.)

We will adopt the same approach in this appeal. We will assume for purposes of argument that Reiber's December 4, 2007, letter set forth a reasonable interpretation of the term "final adverse decision" even though that interpretation was rejected in *Smith v. Adventist Health System/West, supra*, 182 Cal.App.4th 729. Accordingly, we will reject Smith's assertion that Reiber's interpretation of the term "final adverse decision" is unreasonable and thus is evidence of malice.

D. Reasonableness of Application of Ineligibility Period to Smith

Our assumption that the interpretation of the term "final adverse decision" adopted by Reiber and the other defendants was reasonable leads to the next issue in our analysis—namely, whether Reiber reasonably *applied* the 36-month ineligibility period to Smith based on the facts in existence in December 2007. Restated in statutory terms, the question is whether Reiber "act[ed] in [the] reasonable belief that the [application of section 4.5-10 of the Bylaws to Smith was] warranted by the facts known to him …." (Civ. Code, § 43.7, subd. (b).) As we noted in *Smith v. Adventist Health System/West, supra*, 182 Cal.App.4th at page 754, footnote 17, the determination of the meaning of a particular term is a separate question from determining how the provision that contains that term applies to a particular fact pattern. Thus, it is possible that Reiber adopted a reasonable interpretation of the term "final adverse decision" in section 4.5-10 of the Bylaws and yet unreasonably applied that interpretation to the facts when he reached the conclusion that Smith was subject to the 36-month ineligibility period.

1. Triggering event

There are a number of ways to analyze the application of Reiber's interpretation of section 4.5-10 of the Bylaws. One analysis compares the ineligibility provision to a statute of limitations. Both the ineligibility period and the period of a statute of limitations has a specified length and, by necessity, has a particular starting date and ending date. Sometimes courts identify when a statute of limitations begins to run by referring to the event that "triggers" the statute. For example, in *Church v. Jamison*

(2006) 143 Cal.App.4th 1568, this court stated that "[u]nder the statutory theory [of liability], the wrong that triggers the running of the statute of limitations is the violation of the statute." (*Id*. at p. 1583, fn. 25.)

Here, we look to the language of section 4.5-10 of the Bylaws to identify the event that triggers the commencement of the 36-month period of ineligibility. The critical sentence from section 4.5-10 of the Bylaws provides: "An applicant who has *received a final adverse decision* regarding appointment shall not be eligible to reapply to the medical staff for a period of 36 months." (Italics added.) The italicized language clearly identifies the event that triggers the ineligibility period—the applicant's receipt of a final adverse decision. Thus, Smith's 36-month period was triggered once a "final adverse decision regarding appointment" existed and he "received" that decision.

2. Application to facts existing in December 2007

Reiber's December 4, 2007, letter noted that Smith had challenged the decisions of the governing boards of Hanford Community Medical Center and Central Valley General Hospital by filing a petition for writ of mandate and that the lawsuit was still pending. Based on these facts, the letter asserted: "Thus, there is no final decision in that matter." This assertion is the same as saying that the triggering event has not occurred. The only objectively reasonable conclusion that can be drawn from the absence of the triggering event is that the 36-month period of ineligibility had not begun and, thus, Smith was not ineligible. There remained the *possibility* that the triggering event would be fulfilled at some future date, but the Bylaws do not base ineligibility on the mere possibility. The Bylaws were drafted so the 36-month period was tied to a specific event—that is, the applicant's receipt of a final adverse decision.

Reiber's position in December 2007 that Smith was ineligible to apply for clinical privileges was not a reasonable application of his own interpretation of section 4.5-10 of the Bylaws.[4]

The unreasonableness of the attempt to declare Smith ineligible *before* he received a final adverse decision from a court is demonstrated by viewing the logical consequences of that position from other perspectives. For example, one could ask whether Reiber's application of section 4.5-10 of the Bylaws to Smith's situation actually would result in a 36-month ineligibility period. The answer to this question is that Reiber's application of section 4.5-10 of the Bylaws would treat Smith as ineligible for a period longer than 36 months. Under Reiber's view, Smith was required to wait (1) the uncertain amount of time that would pass before the final adverse decision was rendered in the court proceeding plus (2) the 36 months that followed his receipt of that final decision.

In short, it was unreasonable for the December 4, 2007, letter to assert that Smith was subject to the 36-month ineligibility period because, under the letter's own interpretation of that provision, that period had not commenced. That position makes no more sense than telling an applicant he or she is not eligible because the event that triggers ineligibility has not occurred but might occur sometime in the future.

E. Inferences Supported by Unreasonable Application of Bylaws

The attempt to apply the 36-month ineligibility period to Smith based on the circumstances that existed in December 2007 was unreasonable under an objective standard. The objectively unreasonable attempt is evidence that supports the inference

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[4]We restate here that the ambiguities in section 4.5-10 of the Bylaws are separate and distinct questions from whether the *application* of Reiber's interpretation of the term "final adverse decision" was reasonable.

The reasonable application of Reiber's interpretation would have led to (1) the conclusion that Smith was not ineligible under section 4.5-10 of the Bylaws and (2) the processing of his reapplication in accordance with the steps set forth in article IV of the Bylaws.

that the persons behind the attempt were motivated by ill will or malice towards Smith. (Cf. *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 418 [in defamation action, malice that negates publisher's qualified privilege may be inferred if publisher did not have reasonable cause to believe statement to be true].) This inference also is supported by the fact that defendants (including Reiber) continued to assert this objectively unreasonable application of section 4.5-10 of the Bylaws to Smith even after his attorney sent a letter to counsel representing CMStaff pointing out the flawed reasoning of asserting simultaneously that (1) there was no final decision and (2) Smith was ineligible.

Based on these circumstances, a reasonable trier of fact could find that Reiber and the other individuals involved in the interpretation and application of the Bylaws acted with malice, did not make a reasonable effort to obtain facts, or acted without a reasonable belief that the actions taken by them were warranted by the facts. Such a finding would lead to the conclusion that Reiber and those individuals were not protected by the qualified privilege set forth in Civil Code section 43.7, subdivision (b).

Based on the foregoing, we conclude that Reiber has not established that the trial court erred in denying his anti-SLAPP motion.

V. Other Qualified Privileges

Reiber's opening brief also contends he is protected by the qualified privileges set forth in Civil Code sections 43.8, subdivision (a), and 47, subdivision (c).

The evidence in the record that supports the inference that Reiber did not have the requisite state of mind to obtain protection under the qualified privilege set forth in Civil Code section 43.7, subdivision (b) also precludes this court from determining that, as a matter of law, Reiber is protected by the other two qualified privileges.

VI. Motions for Judicial Notice

We deny Smith's August 20, 2010, motion requesting judicial notice of court record and defendants' August 30, 2010, motion for judicial notice of the referee's

June 24, 2010, "Final Statement of Decision Following Appeal and Remand" filed in the lawsuit involving the attempted sale of Smith's practice and clinics. Those motions concern matters related to arguments regarding the doctrine of law of the case, a doctrine which is not addressed in this decision.

DISPOSITION

The trial court's order denying defendants' special motions to strike is affirmed. Plaintiffs shall recover their costs on appeal.

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DAWSON, J.

WE CONCUR:

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LEVY, Acting P.J.

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HILL, J.